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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(Oakland Division)

19 De Sol Corp., Inc., a California corporation,
 20 Plaintiff,
 21 vs.
 22 Vegas Connection, Inc., a California
 23 corporation; Omar Awad, an individual;
 24 Jahangir Shahriari, an individual,
 25 Defendants.
 26

Case No. C07 4107 SBA

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF OPPOSITION TO
DEFENDANTS' MOTION TO
TRANSFER CASE FOR IMPROPER
VENUE**

**Hearing Date: December 18, 2007
Time: 1:00 p.m.
Dept.: 3**

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I. STATEMENT OF ISSUES

28 Defendants Vegas Connection, Inc., Omar Awad, and Jahangir Shahriari contend in this
 Motion to Transfer that Plaintiff De Sol Corp., Inc.'s choice of venue is improper because all
 defendants reside in the Central District of California, and the events or omissions giving rise to
 Plaintiff's claims arose, if at all, in the Central District. No events or omissions, defendants
 contend, arose in the Northern District of California. Alternatively, Defendants argue that even
 if Plaintiff's choice of venue is proper, for the convenience of defendants' "witnesses," the
 action should be transferred to the Central District.

1 Plaintiff disputes both arguments. Venue is proper under 28 U.S.C. § 1391(b)(2), as
 2 alleged in the Complaint, because a significant portion of the events or omissions giving rise to
 3 Plaintiff's claims arose in the Northern District. Complaint ¶ 8; Declaration of Roberto Alvaro
 4 in Support of Opposition to Defendants' Motion to Transfer Case for Improper Venue ("Decl. of
 5 Alvaro") ¶¶ 7, 8, 10- 11, 14-16.

6 Moreover, two of the four "witnesses" named by the defendants in their Motion are
 7 current customers of De Sol Corp. and most certainly will not be testifying on behalf of the
 8 defendants in support of their allegations of fraud, scams, and/or conspiracies. Decl. of Alvaro
 9 ¶¶ 17-19. The two remaining "witnesses" named in the Motion are employed by Defendant
 10 Vegas Connection. Decl. of Alvaro ¶ 18. Plaintiff also has employees, who work and reside in
 11 the Northern District, who will testify on its behalf at trial, thus, it is of no significance that
 12 defendants have employees located in Los Angeles who may be willing to testify. Id.

13 II. STATEMENT OF FACTS

14 Plaintiff imported produce from Mexico and sold it to defendants between January and
 15 June 2007. Complaint ¶ 11; Decl. of Alvaro ¶ 6. Defendants then resold the produce for a
 16 profit, but did not pay Plaintiff for some of the produce shipments. Id.

17 Plaintiff operates primarily out of its office in San Mateo, California. Complaint ¶¶ 1,
 18 11; Decl. of Alvaro ¶ 7. The unpaid invoices at issue in this action, which memorialized the
 19 contracts between Plaintiff and defendants, were faxed from Plaintiff's San Mateo office to
 20 defendants' office in Los Angeles, or from Shasta Produce's office in South San Francisco,
 21 where Plaintiff's president Roberto Alvaro used to work, to defendants' office in Los Angeles.
 22 Decl. of Alvaro ¶ 10.

23 Occasionally, an adjustment in quantity and/or price on the produce delivered to
 24 defendants was necessary, and those negotiations and agreements/adjustments were
 25 consummated over the phone between Plaintiff's employees Elizabeth Alvaro or Roberto Alvaro
 26 in San Mateo, and defendants' representatives in Los Angeles. Decl. of Alvaro ¶ 11.

1 As of February 2007, Roberto Alvaro still did some work for Shasta Produce in South
2 San Francisco, and the defendants faxed wire transfer statements, invoices and other documents
3 to Mr. Alvaro's attention at Shasta's warehouse, in addition to faxes that defendants sent to De
4 Sol Corp.'s office in San Mateo. Decl. of Alvaro ¶¶ 14-16, Plaintiff's Exhibits 4-5.

5 At all relevant times, defendants knew that Plaintiff operated out of a San Mateo office,
6 and, at all relevant times, the defendants negotiated price, quantity, and other aspects of the
7 produce transactions at issue in this action knowing that Plaintiff was located in San Mateo.
8 Decl. of Alvaro ¶¶ 5, 8-9, 12, 4-16; Complaint ¶ 11.

III. LEGAL ARGUMENT

A. **DEFENDANTS' MOTION MUST BE DENIED FOR LACK OF ADMISSIBLE EVIDENCE IN SUPPORT OF THE MOTION**

Defendants did not file an affidavit or declaration which contains admissible evidence in support of their various arguments in this Motion. See Plaintiff's Objections to Declarations of Jahangir Shahriari and Bart Botta filed concurrently herewith. Accordingly, the Motion should be denied. The purported evidence contained in Mr. Shahriari's declaration is not sworn or attested to under penalty of perjury as required by law. 28 U.S.C. § 1746. Declarations with admissible evidence are required to establish the facts relative to a motion to transfer venue. The residence of the parties, and the location of witnesses and/or physical evidence must be established by competent, admissible evidence. Stop-A-Flat Corp. v. Electra Start of Michigan, Inc. 507 F.Supp. 647, 652 (ED PA 1981); N.D.C.A. Rule 7-5(b).

21 Although the Declaration of Bart Botta is properly sworn or attested to under penalty of
22 perjury, the declaration fails to constitute admissible evidence. The declaration contains
23 irrelevant legal arguments regarding consolidation of two unrelated actions, but introduces no
24 facts whatsoever that would support defendants' venue argument.

25 The Court should therefore deny this Motion in its entirety since defendants introduced
26 no evidence to contradict Plaintiff's statement of venue. Complaint ¶ 8.

1 **B. PLAINTIFF'S CHOICE OF VENUE IN THE NORTHERN DISTRICT IS**
 2 **PROPER BECAUSE SIGNIFICANT EVENTS OR OMISSIONS GIVING RISE**
 3 **TO ITS CLAIMS OCCURRED IN THE NORTHERN DISTRICT.**

4 Plaintiff's choice of venue in the Northern District is proper because Plaintiff operated its
 5 business in San Mateo, California, negotiating price, quantity, and other aspects of the produce
 6 transactions at issue with defendants over the telephone and fax machines while in San Mateo.
 7 Decl. of Alvaro ¶¶ 5, 8-9, 12, 4-16; Complaint ¶ 11. Section 1391 states the following with
 8 respect to proper venue:

9 A civil action wherein jurisdiction is not founded solely on diversity of citizenship may,
 10 except as otherwise provided by law, be brought only in (1) a judicial district where any
 11 defendant resides, if all defendants reside in the same State, (2) a judicial district in
 12 which a substantial part of the events or omissions giving rise to the claim occurred, or a
 13 substantial part of property that is the subject of the action is situated, or (3) a judicial
 14 district in which any defendant may be found, if there is no district in which the action
 15 may otherwise be brought. 28 U.S.C. § 1391(b).

16 The "events or omissions" on which Plaintiff's claim is based may occur in several
 17 districts. *See Bates v. C & S Adjusters, Inc.* 980 F.2d 865, 867 (2nd Cir. 1992); *Carekeeper*
 18 *Software Develop. Co., Inc. v. Silver* 46 F.Supp.2d 1366, 1368 (ND GA 1999). Section
 19 1391(b)(2) does not require that a majority of the "events or omissions" occur in the district
 20 where suit is filed; nor that the events there predominate. It is sufficient that a "substantial part"
 21 occur there. *Jenkins Brick Co. v. Bremer* 321 F.3d 1366, 1371 (11th Cir. 2003).

22 A plaintiff may choose either of several districts having relatively equal connections with
 23 the dispute. *First of Mich. Corp. v. Bramlet* 141 F.3d 260, 264 (6th Cir. 1998); *TruServ Corp. v.*
 24 *Neff* 6 F.Supp.2d 790, 792 (ND IL 1998)(personal guarantees signed in one state for payment in
 25 another). "The fact that substantial activities took place in district B does not disqualify district
 26 A as proper venue as long as 'substantial' activities took place in A, too. Indeed, district A
 27 should not be disqualified even if it is shown that the activities in district B were more
 28 substantial, or even the most substantial." *First of Mich. Corp., supra*, 141 F.3d at 263.

1 Here, Plaintiff operated out of its office in San Mateo, California. Complaint ¶¶ 1, 11;
2 Decl. of Alvaro ¶ 7. The unpaid invoices at issue in this action, which memorialized the
3 contracts between Plaintiff and defendants, were faxed from Plaintiff's San Mateo office to
4 defendants' office in Los Angeles, or from Shasta Produce's office in South San Francisco,
5 where Plaintiff's president Roberto Alvaro used to work, to defendants' office in Los Angeles.
6 Decl. of Alvaro ¶ 10. Occasionally, an adjustment in quantity and/or price on the produce
7 delivered to defendants was necessary, and those negotiations and agreements/adjustments were
8 consummated over the phone between Plaintiff's employees Elizabeth Alvaro or Roberto Alvaro
9 in San Mateo, and defendants' representatives in Los Angeles. Decl. of Alvaro ¶ 11.

10 The invoices reveal that the defendants faxed wire transfer statements, invoices and other
11 documents to Mr. Alvaro’s attention at Shasta’s warehouse in South San Francisco, in addition
12 to faxes that defendants sent to De Sol Corp.’s office in San Mateo. Decl. of Alvaro ¶¶ 14-16,
13 Plaintiff’s Exhibits 4-5. Plaintiff’s evidence flies in the face of defendants’ arguments and
14 unverified statements that defendants had no knowledge that Plaintiff’s business is and was
15 located in the Northern District. Decl. of Shahriari ¶¶ 8, 15.

16 The fact that some of the *payments* (not at issue in this action) were hand delivered to
17 Plaintiff's associates in Los Angeles and wire transfers were sent from banks in Los Angeles to
18 banks in Mexico does not support the contention that no significant events or omissions occurred
19 in the Northern District of California. The events or omissions alleged in the Complaint relate to
20 *the lack of payment* on produce shipments. The produce transactions/shipments that were not
21 paid for were negotiated and consummated by Plaintiff in San Mateo while defendants were in
22 Los Angeles. The events discussed by the defendants, which relate to *payment* for produce are,
23 by nature, irrelevant.

24 It may be conceivable that Plaintiff's action could have been filed in the Central District,
25 where the defendants all reside, but "could have been" is not the legal standard. Section 1391
26 allows Plaintiff to file its action in the district (1) where the defendants reside, (2) where a

1 substantial part of the events or omissions occurred, “**or**” (3) in a district where any defendant
 2 may be found, if no other district would be proper. 28 U.S.C. § 1391(b)(2). Here, a majority of
 3 the events took place in the Northern District. The defendants failed to introduce evidence to
 4 contradict Plaintiff’s venue statement in the Complaint. See Complaint ¶ 8.

5 **C. CONSIDERATIONS OF CONVENIENCE OF THE PARTIES, WITNESSES, AND**
 6 **THE INTERESTS OF JUSTICE WEIGH IN FAVOR OF LEAVING THIS**
 7 **ACTION IN THE NORTHERN DISTRICT OF CALIFORNIA**

8 Two of the four “witnesses” named by the defendants in their Motion, who will allegedly
 9 testify on their behalf, are current customers of De Sol Corp., and most certainly will not be
 10 testifying in support of defendants’ allegations of fraud, scams, and/or conspiracies. Decl. of
 11 Alvaro ¶¶ 17-19. Defendants two other “witnesses” are employed by Defendant Vegas
 12 Connection. Decl. of Alvaro ¶ 18. Plaintiff also has employees, who work and reside in the
 13 Northern District, who will testify on its behalf at trial, thus, it is of no significance that
 14 defendants have employees located in Los Angeles who may be willing to testify. *Id.*

15 Section 1404 of the United States Code states that “for the convenience of parties and
 16 witnesses, in the interest of justice, a district court may transfer any civil action to any other
 17 district or division where it might have been brought.” 28 U.S.C. § 1404(a). The moving party
 18 has the burden of showing that “the convenience of parties and witnesses” and “interest of
 19 justice” requires transfer to another district. Commodity Futures Trading Comm'n v. Savage 611
 20 F.2d 270, 279 (9th Cir. 1979). A plaintiff’s choice of forum is accorded substantial weight in
 21 proceedings under § 1404(a) (so-called “home turf” rule). Courts generally will not order a
 22 transfer unless the “convenience” and “justice” factors enumerated above strongly favor venue
 23 elsewhere. Securities Investor Protection Corp. v. Vigman 764 F.2d 1309, 1317 (9th Cir. 1985).
 24 The moving party has the burden of demonstrating a clear balance of inconveniences. Harris
 25 Trust & Sav. Bank v. SLT Warehouse Co., Inc. 605 F.Supp. 225, 227 (ND IL 1985). Courts will
 26 consider not only the number of witnesses located in the respective districts, but also the nature

1 and quality of their testimony in relation to the issues in the case. Brandon Apparel Group, Inc.
 2 v. Quitman Mfg. Co. Inc. 42 F.Supp.2d 821, 834 (ND IL 1999).

3 Defendant Shahriari supports the defendants' convenience argument by listing (in his
 4 unverified declaration) the names of four individual who will allegedly testify on defendants'
 5 behalf, and who reside in the Central District of California: Jose Palasios, Artemio Gomez,
 6 Serafin [last name unknown], and Habib Balashka. Decl. of Shahriari ¶¶ 20-21. However, Jose
 7 Palasios and Artemio Gomez are currently employed by Vegas Connection, so it is no surprise
 8 that defendants would have employees who might act as witnesses. Decl. of Alvaro ¶ 18. De
 9 Sol Corp. has employees, located in the Northern District, who will act as witnesses in this
 10 action. Decl. of Alvaro ¶ 18.

11 Habib Balashka and Serafin will not be providing testimony for the defendants. Those
 12 individuals are current customers of Plaintiff, and have transacted business with Plaintiff as
 13 recently as November 14, 2007. Decl. of Alvaro ¶ 19. Mr. Balashka and Serafin will not
 14 support defendants' allegations of scams, fraud, and/or conspiracies. Decl. of Alvaro ¶ 19.
 15 Thus, defendants have offered the names of two of its employees who allegedly testify on their
 16 behalf. Moreover, defendants fail to state what testimony Mr. Balashka and Serafin will offer, or
 17 why their testimony would be important to this action. *See A.J. Industries, Inc. v. United States*
 18 Dist. Ct. 503 F.2d 384, 389 (9th Cir. 1974).

19 Defendants' convenience arguments must fail. Defendants have not met their burden of
 20 establishing that convenience to potential witnesses weighs in favor of moving this action to
 21 Southern California. The convenience of Plaintiff and Plaintiff's employees is also relevant for
 22 the Court to consider. Plaintiff has a number of employees and significant documentary
 23 evidence that would need to be transported to the Central District for law and motion hearings
 24 and, ultimately, trial. "The venue transfer provisions of Section 1404(a) are not meant to merely
 25 shift the inconvenience to the plaintiff." Reed Elsevier, Inc. v. Innovator Corp. 105 F.Supp.2d
 26 816, 821 (SD OH 2000)(internal quotes omitted).

IV. CONCLUSION

Defendants' Motion to Transfer must be denied. First, defendants failed to introduce any admissible evidence in support of their improper venue and convenience arguments.

Second, even if the Court were to consider defendants' unsworn declaration, the invoices submitted by Plaintiff contradict Mr. Shahriari's statements that he had no knowledge, until May 2007, that Plaintiff was located in Northern California. Decl. of Alvaro, Ex. 4-5. The invoices were faxed to and from the parties' offices in San Mateo, South San Francisco, and Los Angeles, in January 2007 when the parties first transacted business together.

Lastly, the defendants failed to demonstrate that they have any more witnesses to testify on their behalf, who reside in the Central District, than the number of witnesses Plaintiff has in the Northern District who will testify on its behalf. Plaintiff also has employees and business associates in the Northern District who will testify on its behalf. Decl. of Alvaro ¶¶ 9, 18.

Defendants failed to meet their initial burden that this action should be transferred to the Central District of California.

DATED: November 27, 2007

GREENE, CHAUVEL, DESCALSO & MINOLETTI

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